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91-144

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1991

DEBORAH SISKA,

Petitioner

vs.

THE TRAVELERS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF THE
STATE OF WISCONSIN

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QUESTION PRESENTED FOR REVIEW

Is a denial of benefits by an ERISA plan administrator under an employee welfare plan based upon a factual determination entitled to full deference under an arbitrary and capricious standard of judicial review or does the de novo standard apply, where the plan administrator is operating under a conflict of interest and has no discretionary authority under the plan to make eligibility determinations?

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Guisti v. General Electric Company, 733 F. Supp. 141 (N.D. N.Y. 1990) . . . .

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Questech v. Hartford Accident and Indemnity Company, 713 F. Supp. 956 (E.D. Va. 1989) . . . . . .

Rivera v. Benefit Trust Life Insurance Company, 921 F.2d 692 (7th Circuit 1991) . . . . . .

OPINION BELOW

On April 30, 1991, the Supreme Court of the State of Wisconsin, issued an order denying Petitioner's petition for review of the decision of the Court of Appeals of Wisconsin. A copy of this order is attached as Appendix A.

The Court of Appeals of Wisconsin, District II, issued a decision and opinion on February 20, 1991 affirming a summary judgment of the Circuit Court for Walworth County, Wisconsin, dismissing Petitioner's complaint entered on May 3, 1990. A copy of this decision is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1257.

STATUTES INVOLVED

Title 29, United States Code, Sections 1001(a) and (b), 1002(1),(7),(8),(16)(A), (21(A), 1104(a)(1)(A), 1132(a), (e)(1) and (g)(1). These statutory provisions are set out verbatim in Appendix F.

STATEMENT OF THE CASE

Donald Siska, spouse of the Petitioner, was issued a certificate of insurance through his employer, Wabash Tape Corporation, under a group accidental death policy issued by Respondent. In August 1981, while sailing with a group of friends and Petitioner on Lake Geneva, Wisconsin, Donald Siska jumped off the boat to retrieve a cap which had blown into the water. The boat was not under sail at the time. It was a windy day and the lake was rough. The water was 140' deep. Donald swam to the hat but the boat drifted away from him. The operator of the boat was unable to start the engine and eventually raised the sail and maneuvered the boat to Donald's location but he had disappeared. He has not been seen since. Respondent refused to pay the accidental death benefit of $100,000 under the policy on the ground that Donald Siska had "staged his

disappearance," rather than having accidentally drowned in the waters of the lake. Additional facts are contained in the decision of the Wisconsin Court of Appeals, Appendix B.

The federal questions sought to be reviewed were first raised by Respondent when it attempted to remove the case to the United States District Court for the Eastern District of Wisconsin. The case was remanded to the state court because removal was untimely and Respondent had waived its right to remove (R3-1 to 3-4). The state trial court found that ERISA had pre-empted state law as it relates to this claim (R 10-1 to 10-7). All of the federal questions raised by this Petition were raised and fully briefed in the Wisconsin Court of Appeals by both Petitioner and Respondent as well as in the Wisconsin Supreme Court. See Appendixes B and E of this Petition for the decisions of the Wisconsin Court of

Appeals and of the trial court both based on the federal questions raised.

ARGUMENT

The Travelers denied Petitioner's claim for the policy proceeds under its own group accidental death policy and that denial was given full deference by the state trial and appellate courts which applied an arbitrary and capricious standard of review.

In Firestone Tire and Rubber Company v. Bruch, 489 U.S. 101, 109 S. Ct. 948, 103 L.Ed.2d 80 (1989), the Supreme Court announced the rule that ". . . a denial of benefits challenged under [29 U.S.C.] §1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Id 489 U.S. 115. This holding overruled the cases which held that

the arbitrary and capricious standard of review was appropriate in all cases under the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 829, as amended, 29 U.S.C. §1001 et seq., which had been imported wholesale from review of cases arising under a section of the Labor Management Relations Act, 61 Stat. 157, 29 U.S.C. §186(c). The Firestone de novo standard was announced in the context of a plan interpretation case.

After Firestone, two lines of cases have developed with respect to the proper standard to be applied in the review of factual determinations by ERISA administrators. One line mandates de novo review in the absence of an express delegation of discretionary authority to the administrator to make eligibility determinations. See Rivera v. Benefit Trust Life Insurance Company, 921 F.2d 692 (7th Circuit 1991); Petrilli v.

Drechsel, 910 F.2d 1441 (7th Circuit 1990), dictum; Buchholz v. General Electric Employee Benefit Plan, 720 F. Supp. 102 (N.D. Ill. 1989); Dzinglski v. Weirton Steel Corporation, 875 F.2d 1075 (4th Circuit 1989); Moon v. American Home Assurance Company, 888 F.2d 86 (4th Circuit 1989); Baker v. Big Star Division of the Grand Union Company, 893 F.2d 288 (11th Circuit 1989); Arthurs v. Metropolitan Life Insurance Company, 760 F. Supp. 1095 (S.D. N.Y. 1991); Guisti v. General Electric Company, 733 F. Supp. 141 (N.D. N.Y. 1990); Gurnack v. John Hancock Mutual Life Insurance Company, 406 Mass. 748, 550 N.E.2d 391 (1990).

The other line of cases limits de novo review under Firestone to plan interpretations and continues the arbitrary and capricious standard of review for factual determinations. See Questech v. Hartford Accident and Indemnity Company, 713 F.

Supp. 956 (E.D. Va. 1989); Petrilli v. Drechsel, 1989 WL 106639 (N.D. Ill. September 12, 1989) rev'd on other grounds; Moshin v. John Hancock Mutual Life Insurance Company, No. 88-60415 (E.D. Mich. November 27, 1989); Barish v. United Mine Workers of America Health and Retirement Fund, 753 F. Supp. 165 (W.D. Pa., 1990).

The Wisconsin Court of Appeals held in this case, reported at 161 Wis.2d 14, N.W.2d (1991), that where the determination of the plan administrator is based on factual findings and no discretion is vested in the administrator, the review should be under an arbitrary and capricious or substantial evidence test, rather than de novo review. This holding is in direct conflict with the holdings of the courts in the first line of cases noted above.

Although the trial court dismissed Petitioner's action on the merits with prejudice, it permitted the submission of

additional evidence to Respondent for its review. For purposes of these proceedings, Petitioner concedes that if the standard of review is arbitrary and capricious, unmodified because of Respondent's inherent and serious conflict of interest, and full deference is given to its decision denying benefits, Petitioner cannot successfully overcome that decision.

The trial court gave no consideration to the inherent and serious conflict of interest under which Respondent is operating. While the Wisconsin Court of Appeals referred to it and gave lip service to modifying the arbitrary and capricious standard because of Respondent's conflict of interest, it gave full deference to the determination denying benefits. (Slip Opinion Appendix B-12 to 15) This holding permits an insurer which has issued a group accidental death policy to make a determination of eligibility for benefits and

receive full deference from reviewing courts in that decision even though it has an inherent and serious conflict of interest since it will pay the benefits out of its own pocket. The Court of Appeals stated that although as the original trier of fact it might have decided differently "we cannot overturn Travelers' decision." (Slip Opinion Appendix B-23) There is no indication whatever that the Court modified the standard to require that a greater quantum or convincing power of evidence be required to uphold the insurer's decision.

We submit that where a biased decision maker is involved, the court should require de novo review rather than attempting to modify the arbitrary and capricious standard. In reviewing a record to determine if there is "substantial evidence" to support a trustee's or an administrator's decision, how does the court factor in a conflict of interest? Does it require more

than substantial evidence, such as a mere preponderance of the evidence, or clear and convincing evidence or evidence beyond a reasonable doubt? The Wisconsin Court of Appeals reviewed the record simply to determine whether the determination was supported by substantial evidence. It gave full deference to the Travelers' decision.

In the Guisti case, supra, where the insurer was also the administrator the court said factual findings of an ERISA fiduciary should be subject to de novo review for the same reasons that interpretations of the plan document should be subject to de novo review. "The less deferential standard better protects against potential conflicts of interest and better serves ERISA's goal of protecting 'the interests of employees and their beneficiaries in employee benefit plans.'" 733 F. Supp. at 147.

As noted in Firestone, "[t]he trust de

novo standard of review is consistent with the judicial interpretation of employee benefit plans prior to the enactment of ERISA. Actions challenging an employer's denial of benefits before the enactment of ERISA were governed by principles of contract law. If the plan did not give the employer or administrator discretionary or final authority to construe uncertain terms, the court reviewed the employee's claim as it would have any other contract claim . . . " Id, 489 U.S. 112. Further, "[a]dopting Firestone's reading of ERISA would require us to impose a standard of review that would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." Id, 489 U.S. 113.

The Court also noted ". . . the de novo standard of review applies regardless of whether the plan at issue is funded or unfunded and regardless of whether the

administrator or fiduciary is operating under a possible or actual conflict of interest. Of course, if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" Id, 489 U.S. 114. Here, neither the plan nor the policy vested any discretion in Travelers. Thus, the former portion of this quoted language should govern rather than the latter portion. That is, because Travelers has a conflict of interest and has no discretionary authority, the de novo standard should be applied rather than attempting to adjust or modify the arbitrary and capricious standard to something less than full deference.

In Brown v. Blue Cross and Blue Shield of Alabama, 898 F.2d 1556 (11th Circuit 1990), the Court of Appeals said "[t]he in-

herent conflict between the fiduciary role and the profit-making objective of an insurance company makes a highly deferential standard of review inappropriate." It is apparent from the decision that the court would have applied the de novo standard to a review of the factual determination of the administrator except for the fact the plan granted discretionary authority to the administrator. There the court said "[w]hile de novo review is an attractive avenue for controlling the exercise of discretion contrary to the interests of the beneficiaries, the application of this strict standard would deny Blue Cross the benefit of the bargain it made in the insurance contract [to have discretionary authority]." The reasoning of the court in Brown provides an adequate basis for application of the de novo standard here.

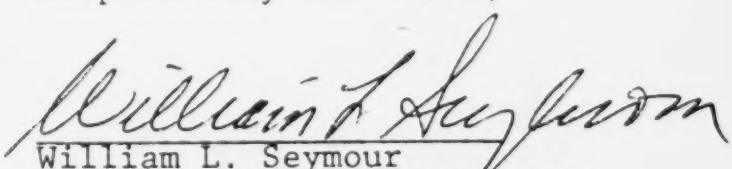
In view of the numbers of group accidental death policies issued and in

force, the questions raised in this case will continue to recur and should be authoritatively resolved.

CONCLUSION

Petitioner Deborah Siska prays that a Writ of Certiorari issue to review the decision of the Wisconsin Court of Appeals affirming the judgment dismissing her claim, and for a reversal of that judgment and remand for a de novo hearing on the merits in the Circuit Court for Walworth County, Wisconsin.

Respectfully submitted,



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SUPREME COURT

STATE OF WISCONSIN

To Hon. James L. Carlson

Walworth County Circuit Court

Courthouse

Elkhorn, WI 53121

[and counsel of record]

The Court today announced an order in your case as follows:

No. 90-1307 Siska v. The Travelers

L.C.#86-CV-133

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of plaintiff-appellant-petitioner Deborah Siska, and considered by the court,

IT IS ORDERED that the petition for review is denied, with $50 costs.

MARILYN L. GRAVES

Clerk of Supreme Court.

No. 90-1307

STATE OF WISCONSIN IN COURT OF APPEALS

DISTRICT II

DEBORAH SISKA,

Plaintiff-Appellant,

v.

THE TRAVELERS,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. Affirmed.

Before Nettesheim, P.J., Scott and Anderson, JJ.

ANDERSON, J. Deborah Siska appeals from a summary judgment in favor of the Travelers. The trial court determined that Travelers did not act arbitrarily or capriciously when it denied Deborah's request for proceeds from an accidental death benefits plan insuring her husband. There are

three issues on appeal: (1) whether the denial of benefits based on factual findings by Travelers is subject to a deferential standard of review; (2) whether the court's review of the denial of benefits is limited to the record before Travelers at the time of the denial; and (3) whether the denial was arbitrary or capricious. We affirm the trial court on each issue.[1]

I.

Travelers issued a group accidental death policy through the Indiana Manufacturers' Association, Inc. The policy was made available to Donald by his employer, Wabash Tape Corporation. The policy

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[1]Because we affirm the judgment of the trial court and do not remand, we do not address two issues raised by the parties: (1) whether Deborah is entitled to a jury trial; and (2) whether she is the proper beneficiary of the accidental death policy.

provides $100,000 if the employee dies through accidental means and within ninety days of the accident. His second wife, Deborah Siska, was the named beneficiary at the time of his disappearance.

Donald disappeared in the waters of Lake Geneva, Wisconsin, in August 1981. Deborah requested proceeds payable under the policy. An examiner from Travelers' law department litigation unit concluded that he was "unable to make a determination from the information ... received to date, whether or not Donald J. Siska suffered an accidental death ...." Deborah was denied the proceeds of the policy.

Deborah then commenced this action. Travelers attempted to remove the case to federal court. The federal district court stated that the purchase of the insurance through a multi-employer trust was a plan within the meaning of the Employee's Retirement Income Security Act (ERISA), 29

U.S.C. sec. 1001 et seq. The federal district court held that the action was preempted by 29 U.S.C. sec. 1144(a) and was removable. However, Travelers waived its right to remove by not doing so within thirty days of filing the action. Because this case invoked concurrent jurisdiction under 29 U.S.C. sec. 1132(e), the case was remanded to the Wisconsin trial court.

The trial court found that state law was preempted. See 29 U.S.C. sec. 1144(a). This decision is not challenged. The trial court held that an arbitrary and capricious standard of review, rather than de novo review, applied to Travelers' denial of benefits and ordered summary judgment in favor of Travelers. The trial court instructed Travelers to consider new evidence produced by Deborah and dismissed the action with prejudice.[2] Deborah's claim that

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[2]The order for judgment states: [cont.]

Travelers had a conflict of interest was not considered by the trial court.

II.

The first issue is the standard of review that this court must use to review Travelers' decision to deny benefits. This is a civil action to recover benefits due under the terms of an ERISA plan. See 29 U.S.C. sec. 1132(a)(1)(B). ERISA does not set out the standand of review for actions under 29 U.S.C. sec. 1132(a)(1)(B) challenging benefit eligibility determinations. Questech, Inc. v. Hartford Accident &

[cont.] IT IS HEREBY FURTHER ORDERED that this matter be remanded to the Travelers so that the plaintiff can submit additional evidence in support of her claim for accidental death benefits under Travelers' group policy. Any such evidence is to be submitted no later than May 19, 1990.

Indem. Co., 713 F. Supp. 956, 962 (E.D. Va. 1989).

Benefit denials can be based on an administrator's factual findings or based on the administrator's interpretation of the benefit plan. Until recently, the clear weight of federal authority gave deference to the plan administrator's decision as long as it was not arbitrary and capricious. Guisti v. General Elec. Co., 733 F. Supp. 141, 145 (N.D. N.Y. 1990). The arbitrary and capricious standard was applied whether the decision was based on factual findings or on an interpretation of the benefit plan. See, e.g., Bance v. Alaska Carpenters Retirement Plan, 829 F.2d 820, 822-23 (9th Cir. 1987) (benefits denied based on an interpretation of the plan); LeFebre v. Westinghouse Elec. Corp., 747 F.2d 197, 202 (4th Cir. 1984) (benefits denied based on factual findings).

The United States Supreme Court rejected the uniform application of a deferential standard of review of benefit denials in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). However, the scope of Firestone's holding is uncertain and has given rise to a split within the federal courts. The split concerns the question of whether Firestone applies only to benefit denials based on an interpretation of the benefit plan or to those denials based on factual findings as well.

In Firestone, the Firestone Tire and Rubber Company maintained a termination pay plan for its employees. The plan was an employee benefit plan under 29 U.S.C. sec. 1002(3) and thus fell within the scope of ERISA. Firestone was the administrator and fiduciary of the plan. Firestone sold its plastics division to Occidental Petroleum. Several employees retained by Occidental filed for termination benefits from

Firestone. Their benefits were denied because the sale of the plastics division did not constitute a "reduction in work force" under the termination plan. Firestone, 489 U.S. at 106.

The lower federal court used the arbitrary and capricious standard. The Supreme Court held that de novo review is the proper standard of review. Id. at 115. The Court reasoned that the general principles of trust law should govern and fashioned the following rule:

> A denial of benefits challenged under sec. 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Id.

The federal courts are split on whether the application of Firestone's rule

extends to situations where benefits are denied based on the administrator's factual findings. One line of cases reads Firestone to limit the rule to situations where the plan administrator denies benefits based on an interpretation of the benefit plan. Questech, 713 F. Supp. at 962-63; Barish v. United Mine Workers Health and Retirement Fund, No. CIV A 90-0160, slip op. at 3 (W.D. Pa. Dec. 20, 1990) (WESTLAW, 1990 WL 209876). Other federal cases read Firestone's rationale to apply equally to denial of benefits based on factual findings. Guisti, 733 F. Supp. at 147-48; Buchholz v. General Elec. Employee Benefit Plan, 720 F. Supp. 102, 104-05 (N.D. Ill. 1989); Newell v. Prudential Ins. Co. of America, 725 F. Supp. 1233, 1240-41 (N.D. Ga. 1989) modified, 904 F.2d 644 (11th Cir. 1990).[3]

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[3]Many cases do not address the distinction

The introductory language in Firestone is one of the strongest reasons for its narrow application. See Petrilli v. Drechsel, 910 F.2d 1441, 1446 (7th Cir. 1990).

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between factual findings and plan construction, and base their analysis on whether the benefit plan vests the administrator with discretion. Thus, such cases are inapplicable to our analysis. See, e.g., Moon v. American Home Assurance Co, 888 F.2d 86, 88 (11th Cir. 1989); Bali v. Blue Cross & Blue Shield Ass'n, 873 F.2d 1043, 1047 (7th Cir. 1989); Boyd v. Trustees of United Mine Workers Health & Retirement Funds, 873 F.2d 57, 59 (4th Cir. 1989). The cases which clearly deal with plan interpretation are also inapplicable. See Parsons v. West Virginia Works Hourly Employees Pension Plan, 879 F. 2d 130, 131-32 (4th Cir. 1989); Brown v. Ampco- Pittsburgh Corp., 876 F.2d 546, 549 (6th Cir. 1989).

The Supreme Court wrote: "The discussion which follows is limited to the appropriate standard of review in sec. 1132(a)(1)(B) actions challenging denials of benefits based on plan interpretations." Firestone, 489 U.S. at 108 (emphasis added). This statement and the holding can be interpreted to mean that de novo review is appropriate only for the non-discretionary decisions of the administrator when the administrator denies benefits based on an interpretation of the benefit plan. Thus, denial of benefits based on factual findings, and not based on a plan interpretation, are exempt from de novo review.

After careful consideration of the decisions interpreting Firestone and the arguments presented by the federal courts, we adopt the narrower reading of Firestone. Thus, we hold that because there is no dispute over the terms of the accidental death policy, and the only dispute lies in

the correctness of factual findings made by Travelers, our review is limited to whether Travelers' decision was arbitrary and capricious.

Deborah argues that, despite our interpretation of Firestone, no deference should be given to Travelers because Travelers has a potential conflict of interest in making a determination which would cost Travelers over $100,000. Deborah argues that a de novo review should apply because of the potential conflict of interest. We disagree.

This case presents a potential conflict of interest. We agree with Brown v. Blue Cross & Blue Shield of Alabama, Inc., 898 F.2d 1556 (11th Cir. 1990), in which the court stated:

> Because an insurance company pays out to beneficiaries from its own assets rather than the assets of a trust, its fiduciary role lies in perpetual

> conflict with its profit-making role as a business. That is, when an insurance company serves as ERISA fiduciary to a plan composed solely of a policy or contract issued by that company, it is exercising discretion over a situation for which it incurs "direct, immediate expense as a result of benefit determinations favorable to [p]lan participants."

Id. at 1561 (quoting DeNobel v. Vitro Corp., 885 F.2d 1189, 1191 (4th Cir. 1989)). Travelers, the fiduciary in this case, is the insurer whose own funds would be used to satisfy the claim. It can directly benefit from not disbursing the benefits under the policy.

Despite this potential conflict of interest, however, federal law does not require that a de novo standard of review be substituted for an arbitrary and capricious standard of review. Although Brown

articulated the potential conflict of interest, it maintained the more deferential standard of review. The court held that the application of the arbitrary and capricious standard is "shaped by the circumstances of the inherent conflict of interest." Brown, 898 F.2d at 1563.

In Von Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048 (7th Cir. 1987), the court was asked to abandon the arbitrary and capricious standard in cases where there is a conflict of interest. The court refused, and stated that "flexibility in the scope of judicial review need not require a proliferation of different standards of review; the arbitrary and capricious standard may be a range, not a point." Id. at 1052. The court stated that the arbitrary and capricious standard is flexible and allows the reviewing court to make the necessary adjustments for possible bias in a trustee's decision. Id.

at 1053. The federal courts have accepted this flexible standard. See, e.g., Sage v. Automation, Inc. Pension Plan & Trust, 845 F.2d 885, 895 (10th Cir. 1988).

Furthermore, dicta in Firestone may be instructive. The Supreme Court stated that in cases where the benefit plan vests discretion in the administrator to interpret the plan and there is a potential conflict of interest, that conflict must be weighed as a factor to determine whether there was an abuse of discretion. Firestone, 489 U.S. at 115. The application of the standard to the particular case is the same whether the use of the arbitrary and capricious standard is determined by discretion vested by a plan, or because the denial is based on factual determinations. Thus, a potential conflict of interest does not change the standard of review, but it becomes a factor in determining if the administrator acted arbitrarily and

capriciously.

III.

The second issue concerns the scope of the court's review. The federal law clearly holds that review is limited to the record before the administrator at the time the benefits were denied. Questech, 713 F. Supp. at 962; Wardle v. Central States, S.E. & S.W. Areas Pension Fund, 627 F.2d at 824 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

Furthermore, federal courts have ruled that it is error to admit new evidence when reviewing an administrator's decision under the arbitrary and capricious standard. Berry v. CIBA-Geigy Corp., 761 F.2d 1003, 1007 (4th Cir. 1985). If the court believes the administrator lacked adequate evidence, or should the beneficiary wish to present additional information, the proper course is to remand to the trustees for a new determination. Id.

Any other rule would be incongruous. It would be difficult to determine if an administrator acted arbitrarily and capriciously by relying on information unavailable to the administrator at the time of the decision. Thus, any appellate review is limited to the record before the administrator. It was proper for the trial court to return the case to Travelers for consideration of new evidence.[4] Further-

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[4]Deborah argues that the trial court erred in not retaining jurisdiction when remanding to Travelers. On review of a trial court's decision whether to retain jurisdiction, this court must determine whether the trial court abused its discretion. White v. Ruditys, 117 Wis.2d 130, 135, 343 N.W.2d 421, 423 (Ct. App. 1983). Because this case could be ongoing due to the potential new evidence, judicial economy supports the trial court's decision to not

more, our review is limited also to the record before Travelers.

IV.

The third issue is whether Travelers' decision to deny benefits to Deborah was arbitrary and capricious. The decision by Travelers must be supported by substantial evidence. Wardle, 627 F.2d at 824. Based on the evidence before Travelers and its potential conflict of interest, we conclude that the decision was not arbitrary and capricious.

Travelers hired an investigation service to investigate Donald's disappearance. The service conducted many interviews and a credit check. The investigation yielded the following information, although some witnesses gave inconsistent statements. Donald had worked for Wabash Tape Corporation for three years and was considered a

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retain jurisdiction over this matter.

satisfactory employee. His absentee, sick leave and health records were good. He appeared happy and was doing well at work. In addition to the Travelers policy, he had a group life insurance policy through Wabash for the amount of $92,700, three times his annual salary.

Donald and his second wife, Deborah, and four friends went sailing on Lake Geneva in August, 1981. Witnesses gave different statements as to the amount of alcohol the passengers consumed. The lake was rough, and it was overcast and windy. The passengers were dressed in several layers of clothing. In the afternoon, Donald removed his outer layer of clothing and jumped off the boat to retrieve a cap which had blown overboard. One witness stated that Donald wanted to go swimming all day. Once in the water and near the cap, Donald gave a salute to the other passengers. There were other boats in the area.

The boat was a distance from the shore and the water was about 140 feet deep where Donald jumped. The operator of the boat was unable to start the engine, and by the time the sails were up and the boat had sailed toward Donald, he had disappeared. Donald was not seen in any distress or in peril prior to his disappearance. There is no indication that he yelled for help.

A surface search was commenced immediately, and a dragging search continued for five days. Sonar was employed in the search for the body. An underwater search was conducted by a friend of one of the daughters. All searches were unsuccessful; Donald's body was never found.

At the time of Donald's disappearance, he had been divorced from his first wife for about five months. There were five children from his first marriage. As part of the divorce settlement, Donald agreed to pay outstanding bills of the marriage and

child support of $340.02 every two weeks. His net income was $808.64 every two weeks.

Donald's ex-wife stated that he hated swimming and had an aversion to water. She stated that during their marriage, she rarely saw him participate in water activities. Deborah stated that he was a good swimmer. The passengers on the boat claimed that he was an experienced swimmer, while his employer labeled him as a boating and swimming enthusiast. Donald's ex-wife told investigators that Donald had been named after an uncle who had also disappeared.

An extensive credit search revealed that Donald had debts of over $10,000. There were delinquent credit card accounts and orthodontic bills, and a history of late payments. After his disappearance, his automobile was repossessed by the bank. His ex-wife stated that he was late in child support payments and that the

Internal Revenue Service contacted her about Donald's tax arrearage.

The investigation further revealed that the divorce decree required Donald to maintain life insurance policies existing at the time of the divorce and to make his children beneficiaries. However, the Travelers policy was not included in the list. He named Deborah as the beneficiary after the divorce was finalized, which was four months before he disappeared.

Travelers concluded that Donald had a motive to stage his disappearance and that the evidence was insufficient to show that Donald accidentally drowned. Based on the evidence available to Travelers at the time of the decision, we cannot say that the decision was arbitrary and capricious, even with the potential conflict of interest. The facts and the inconsistencies among the witnesses as to the sailing events, Donald's personal life and Donald's financial

status provide substantial support for Travelers' inability to conclude that Donald accidentally drowned. Although as the original trier of fact we might have decided differently, we cannot overturn Travelers' decision. However, new evidence in the future may dictate a different decision by Travelers.

By the Court.--Judgment affirmed.

BENCH DECISION CIRCUIT COURT FOR WALWORTH COUNTY, WISCONSIN, March 19, 1990, Hon. James L. Carlson, Circuit Judge, Presiding.

THE COURT: Well, I think I'm under the opinion in reviewing this that the authority in my opinion is that Judge Race in reconsidering his prior order and considering the Bruch case extended it beyond its limited finding; that Federal Courts, that I can see here have--authority has not been brought to my attention of any convincing case that the Courts are in fact giving it the type of construction that Judge Race did. I think this Petrelli case is one case that the trial Judge in fact continued to use the standard of review of arbitrary and capricious - was there any evidence to sustain the finding of the trustee and its determination of fact, fact questions as opposed to determinations with respect to the interpretation of the plan

and coverage. It may be that all of the due process or all or the rationale behind the Bruch case would apply. It certainly would again throw a good deal more of work back into the trial courts if they are entitled to trial de novo on those issues, but I don't believe that any Court has so ruled to my satisfaction. Of course the Evans case was taken up on arbitrary and capricious basis and were found to be so arbitrary and capricious by the trial Judge on the facts of those cases. Those were pre-Bruch cases, but I believe the weight of the authority is that the arbitrary and capricious standard does apply to these types of fact questions as to whether or not the alleged deceased had suffered bodily injury that in the time period caused his death; whether the named beneficiaries are to be indemnified under the policy. I don't believe that the plaintiff is entitled to a trial de novo nor do I

believe that they are entitled to a jury trial, and in light of the new authority presented and the reconstruction of that case, I think that motion to reconsider should be granted; in fact, Judge Race's findings with respect to summary judgment on the arbitrary and capricious action should be reinstated, and I believe that will be the order and judgment of this Court.

STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

DEBORAH SISKA,

Plaintiff,

v. Case No: 86-CV-133

THE TRAVELERS,

Defendant;

ORDER FOR JUDGMENT

The defendant, having filed its Motion for Summary Judgment, second Motion for Summary Judgment and Motion for Reconsideration, and the court having reviewed all of the briefs on file and having heard the arguments of counsel on March 19, 1990,

IT IS HEREBY ORDERED that the defendant's second Motion for Summary Judgment based on Illinois Divorce Decree is denied, and that the defendant's Motion for Summary Judgment and Motion for Reconsideration are granted;

IT IS HEREBY FURTHER ORDERED that this matter be remanded to the Travelers so that the plaintiff can submit additional evidence in support of her claim for accidental death benefits under Travelers' group policy. Any such evidence is to be submitted no later than May 19, 1990.

IT IS HEREBY FURTHER ORDERED that the Clerk of the Court shall forthwith enter judgment in favor of the defendant, THE TRAVELERS INSURANCE COMPANY, against the plaintiff as follows:

1. Dismissing the plaintiff's complaint, with prejudice and on its merits;

2. Awarding the Travelers its taxable costs and disbursements in connection with this lawsuit.

Dated this 30th day of March, 1990.

BY THE COURT:

/s/ James L. Carlson

HON. JAMES L. CARLSON

Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT WALWORTH COUNTY

DEBORAH SISKA,

Plaintiff,

v. Case No: 86-CV-133

THE TRAVELERS,

Defendant;

JUDGMENT

The court, having granted the defendant's Motion for Summary Judgment and Motion for Reconsideration, and having entered its Order for Judgment directing dismissal of the plaintiff's Complaint with prejudice and on the merits and with costs;

IT IS HEREBY ADJUDGED AND DECREED:

1. The plaintiff's Complaint shall be dismissed and is hereby dismissed with prejudice and on its merits;

2. The defendant, The Travelers Insurance Company, a foreign corporation,

shall have and recover of the plaintiff, Deborah Siska, 4712 Rio Poco Road, Reno, Nevada 89502, the sum of $1,478.00 as and for defendant's taxable costs and disbursements in this lawsuit.

Judgment entered and docketed this 3rd day of May, 1990 at 10:45 o'clock in the a.m.

BY THE COURT:

By: s/ Joanne Matwij, Deputy

CLERK OF COURTS

Title 29, United States Code Labor

Ch. 18 RETIREMENT INCOME SECURITY

§1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities,

and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desireable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated

retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy

of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

§1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for

its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

. . .

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries

may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

. . .

(16)(A) The term "administrator" means--

(i) the person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

. . .

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary

with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

. . .

§1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the

participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) . . .

. . .

§1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) . . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

. . .

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have

exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

. . .

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

. . .

Supreme Court, U.S.
FILED
AUG 14 1991
OFFICE OF THE CLERK

(2)

No. 91-144

In The

Supreme Court of the United States

October Term, 1991

DEBORAH SISKA,

Petitioner,

vs.

THE TRAVELERS,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. Whether reviewing court must hold trial *de novo* of factual findings of ERISA plan fiduciary.

PARTIES INVOLVED

The Travelers, properly The Travelers Insurance Company, is a wholly owned subsidiary of The Travelers Corporation. The Travelers Insurance Company has no subsidiaries which are not wholly owned.

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No. 91-144

In The

Supreme Court of the United States

October Term, 1991

DEBORAH SISKA,

Petitioner,

vs.

THE TRAVELERS,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The petitioner seeks a writ of certiorari from an opinion of the Wisconsin Court of Appeals decided on February 20, 1991. *Siska v. The Travelers,* 161 Wis. 2d 14, 467 N.W.2d 174 (Ct. App. 1991), *petition for review denied,* which affirmed a Decision and Order of the Walworth County Circuit Court entered on May 3, 1990.

ADDITIONAL STATUTES INVOLVED

29 U.S.C. §§ 1002(21)(A), 1104(a), 1133

Sec. 1002. Definitions

For purposes of this title:

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) [29 USCS Sec. 1105(c)(1)(B)].

Sec. 1104. Fiduciary duties

(a) Prudent man standard of care. (1) Subject to sections 403(c) and (d) [29 USCS Sec. 1103(c) and (d)], 4042 [29 USCS Sec. 1342], and 4044 [29 USCS Sec. 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing

that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of any enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

Sec. 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall –

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

STATEMENT OF THE CASE

This is a claim for accidental death benefits brought by the wife of Donald J. Siska. In June of 1978, The Travelers issued to the Trustees of Indiana Manufacturer's Association, Inc., Group Trust, a group health and

accidental death and disability policy covering its members. This policy was reissued as Policy Number GA-8058738 effective October 12, 1979. The policy included a $100,000 accidental death benefit. As a member of the Indiana Manufacturer's Association, employees of the Wabash Tape Company, including Donald Siska, were eligible for benefits under the Travelers' policy. Mr. Siska disappeared on August 16, 1981.

On September 28, 1981, The Travelers received a Notice of Claim from Siska's employer, and on December 4, 1981, received a Statement of Disappearance from Siska's wife, Deborah, the petitioner.

Upon receipt of the petitioner's Notice of Claim, The Travelers retained Equifax Services to investigate Siska's disappearance. In addition to reviewing the reports from Equifax, including 26 personal interviews and contacts, The Travelers reviewed the petitioner's Statement of Disappearance as well as the Walworth County Sheriff's Department reports pertaining to the disappearance. Travelers also kept in contact with Metropolitan Life Insurance Company concerning its investigation.

The Travelers' investigation revealed that on August 16, 1981, Donald John Siska and some friends, including his wife, Deborah, left Crystal Lake, Illinois, to go sailing on Lake Geneva. While there is some discrepancy as to the specific facts, once out on the lake, Siska decided to go swimming, perhaps to recover a cap which had blown into the water. The air and water temperature were both in the 60's, it was overcast and windy. One witness stated that Siska had wanted to go swimming all day and had used the cap as an excuse to get into the water. Although

the other passengers were dressed in several layers of clothing, Siska stripped down to a pair of swimming shorts, which he already had on, and entered the water. According to witnesses, Siska swam to the cap and gave a salute to the other passengers. By this time, the sailboat had drifted some distance from Siska and one passenger, Wayne Van Horn, started the sailboat motor so that Siska could be recovered. Siska has not been seen since. The Walworth County Sheriff's Department conducted an immediate air and water search, including the use of sonar, diving, and five days of dragging at different depths. An underwater search was also conducted by a friend of one of Siska's daughters with no results.

Five months prior to his disappearance, Siska had been granted a divorce from his then wife, Glee Lynn Siska. Pursuant to the divorce decree, Siska was ordered to maintain existing life insurance coverage for the benefit of his children. In addition, Siska was ordered to pay $340.02 every two weeks to his ex-wife as child support. He was also ordered to pay $15,000 toward his wife's attorney's fees. At that time, Siska listed his income as $808.64 every two weeks. On March 4, 1981, judgment for dissolution of Siska's marriage was granted.

At the time of his disappearance, Siska owed over $10,000 to various creditors. Siska also owed three months back child support to his ex-wife. Siska's ex-wife, now Glee Lindquist, reported that her ex-husband had advised her just prior to his disappearance that he was in dire financial straits. At that time, he requested that Mrs. Lindquist reopen her 1980 tax returns so that he might receive a refund by filing a joint return. Mrs. Lindquist also stated that she had been contacted in March of 1981,

five months prior to her husband's disappearance, by IRS agents concerning her ex-husband's tax arrearage. Mrs. Lindquist further indicated that her husband hated swimming and even when their children would want to go swimming, Siska would follow them in a canoe instead of getting into the water.

By letter dated May 4, 1983, Travelers advised Deborah Siska through her attorney, Robert Arnold, that based on their investigation, it could not be concluded that Donald John Siska suffered an accidental death on August 16, 1981. Contrary to the assertion of the petitioner, the petitioner's claims were not denied because Donald Siska had "staged his disappearance", although that possibility was taken into consideration.

Subsequent to the filing of this action, The Travelers sought removal to the United States District Court for the Eastern District of Wisconsin based on a letter received from the plaintiff citing the Employers Retirement Income Security Act and requesting attorney's fees. Pursuant to 28 U.S.C. § 1446(b), The Travelers sought removal based on the fact that this was the first indication by the plaintiff that they were seeking relief under federal law. The Federal District Court for the Eastern District of Wisconsin remanded the matter to Walworth County Circuit Court holding that, although the plaintiff's claim was preempted by ERISA, the defendant's removal was not timely.

On June 3, 1988, the defendant moved for summary judgment arguing that the plaintiff's claim for accidental death benefits under The Travelers' policy was preempted by ERISA and that under ERISA the court was to

overturn the decision of The Travelers denying benefits only if arbitrary and capricious. At a pretrial conference held on July 5, 1988, it was agreed that the court would bifurcate the federal preemption and standard of review questions. Briefing proceeded on the preemption issue, and on October 28, 1988, Judge Race issued a Memorandum Decision finding that state law was preempted and also holding that The Travelers' decision was not arbitrary and capricious.

The plaintiff filed a motion to vacate the court's decision with respect to the standard of review and the parties agreed that this issue should be briefed. On September 11, 1989, Judge Race held that the plaintiff was entitled to a trial *de novo* on the issue of whether there had been an accidental death.

On January 30, 1990, The Travelers moved for summary judgment based on an Illinois divorce decree assigning all life insurance proceeds to Donald Siska's children. On February 5, 1990, The Travelers brought a motion for reconsideration and alternative motions *in limine* arguing that recent federal court decisions compelled the court to apply the arbitrary and capricious standard of review and, in the alternative, that the court's review under either standard be limited to the record before The Travelers at the time the decision to deny benefits was made.

On March 19, 1990, Judge James L. Carlson heard argument on these issues and ruled that there was an issue of fact as to the intent of the parties to the divorce decree precluding summary judgment on that issue.

Judge Carlson further held that an arbitrary and capricious standard of review should be applied under the facts presented. Based on this ruling, Judge Carlson upheld the decision of The Travelers denying benefits to the plaintiff. The plaintiff then requested leave to submit additional materials to The Travelers for consideration. This request was granted and the matter was remanded to The Travelers for review. The Wisconsin Court of Appeals affirmed. The plaintiff filed a Petition for Review which was denied by the Wisconsin Supreme Court by order dated April 30, 1991.

ARGUMENT

The Petitioner Has Failed To Show Special And Important Reasons For Granting Certiorari.

Without citing the provisions of Rule 10 of the Supreme Court Rules, the petitioner appears to argue that there is conflicting authority on the issue presented by this case. The majority of the cases cited by the petitioner, however, are trial court decisions. Under Rule 10.1, the Court will consider a petition for a writ of certiorari where there is a conflict between United States court of appeals or when a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals. The petitioner has failed to show such a conflict.

The Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) held that:

> A denial of benefits challenged under sec. 1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Firestone, 489 U.S. at 115. The Court, however, limited the breadth of this holding.

> The discussion which follows is limited to the appropriate standard of review in sec. 1132(a)(1)(B) actions challenging denials of benefits *based on plan interpretations*.

489 U.S. at 108. (Emphasis added.)

The petitioner is correct in asserting that many courts since *Firestone* have considered the standard of review question. The petitioner has not shown, however, that there is a conflict in the resulting case law or that this Court's guidance is necessary.

Since *Firestone*, the first line of defense for an administrator in denial cases has been to assert an express grant of discretionary authority under the terms of the benefit plan. Naturally, in some of these cases discretionary authority has been found and in others it has not. *See, e.g., Parsons v. West Virginia Works Hourly Employees Pension Plan*, 879 F.2d 130 (4th Cir. 1989); *Brown v. Blue Cross and Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990); *Jett v. Blue Cross and Blue Shield of Alabama, Inc.*, 890 F.2d 1137 (11th Cir. 1989); *Bali v. Blue Cross and Blue Shield Ass'n*, 873 F.2d 1043 (7th Cir. 1989); *Buchholz v. General Elec. Employee Ben. Plan*, 720 F. Supp. 102 (N.D. Ill. 1989); and *Brown v. Ampco-Pittsburgh Corp.*, 876 F.2d 546 (6th Cir. 1989).

In cases in which review of factual findings is sought, plan administrators have also argued that they have "inherent discretion" to decide factual issues. The courts addressing this issue have held that no such "inherent discretion" exists. *See, e.g., Baker v. Big Star Div. of Grand Union Co.*, 893 F.2d 288 (11th Cir. 1989); and *Moon v. American Home Assurance Co.*, 888 F.2d 86 (11th Cir. 1989).

In this case, The Travelers argued that *Firestone*, by its express language, was limited to cases involving plan interpretation. The Wisconsin Court of Appeals agreed. This holding is consistent with the holdings of various federal trial courts that have addressed this specific issue. *See QuesTech, Inc. v. Hartford Accident & Indemnity Co.*, 713 F. Supp. 956 (E.D. Va. 1989); *Petrilli v. Drechsel*, 1989 WL 106639 (N.D. Ill. Sept. 12, 1989), *rev'd on other grounds; Moshin v. John Hancock Mut. Life Ins. Co.*, No. 88-60415-AA (E.D. Mich. Nov. 27, 1989) (order granting summary judgment); and *Barish v. United Mine Workers of America Health & Retirement Fund*, 753 F. Supp. 165 (W.D. Pa. 1990).

The petitioner attempts to create a conflict by citing nine cases; three of which are trial court decisions. Of those nine cases, only three arguably address the issue presented by this case. In two of those three, the issue was discussed only in dicta. *See Petrilli v. Drechsel*, 910 F.2d 1441 (7th Cir. 1990) (" . . . we are not faced here with a factual question, but, as in *Bruch*, an interpretive one."); and *Gurnack v. John Hancock Mut. Life Ins. Co.*, 406 Mass. 748, 550 N.E.2d 391 (1990) ("Each party has accepted the arbitrary and capricious standard as applicable."). The remaining case, *Guisti v. General Elec. Co.*, 733 F. Supp. 141 (N.D.N.Y. 1990), is not in conflict with the decision of the Wisconsin Court of Appeals herein.

> It is far from clear in the present case that the defendants' decision to deny benefits was based solely on factual findings.

Guisti, 733 F. Supp. at 147.

The remaining cases cited by the plaintiff simply are not on point. The standard of review question was neither raised nor argued in *Rivera v. Benefit Trust Life Ins. Co.*, 921 F.2d 692 (7th Cir. 1991), or *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir. 1989).

The issue in *Dzinglski* was whether an ERISA fiduciary is obligated to disclose to a discharged employee, who applies for early retirement benefits, the reasons for his discharge if the denial of benefits is otherwise in accordance with the plan. 875 F.2d at 1076. As previously discussed, in *Moon* and *Baker* the defendants argued that they had "implied" discretion to make factual determinations under the terms of the respective plans involved. In *Arthurs v. Metropolitan Life Ins. Co.*, 760 F. Supp. 1095 (S.D.N.Y. 1991), Metropolitan Life argued that it was granted discretion under the terms of its policy to rule on eligibility for benefits. In its decision, the trial court in *Arthurs* disagreed.

The petitioner has failed to show a conflict in the case law post-*Firestone*. The cases cited by the petitioner which squarely address the issue raised in this case, support the decision of the Wisconsin Court of Appeals. If indeed a legitimate conflict arises with respect to this issue, the Court's guidance may be required. It is not a question, however, which requires the Court's intervention at this time.

CONCLUSION

Petitioner has failed to show special and important reasons for granting certiorari. For the reasons stated in this response and upon the rationale of the lower court decisions, the respondent respectfully requests that the Petition for Writ for Certiorari be denied.

Respectfully submitted,

JOHN R. PENDERGAST, JR.
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